APPENDIX "A".

Act No. 286 of 1938 of Louisiana Title II, Rule 15 provides:

"(A) No person shall park or leave standing any vehicle, whether attended or unattended, upon the paved or improved or main traveled portion of any highway, outside of a business or residence district, when it is practicable to park or leave such vehicle standing off of the paved or improved or main traveled portion of such highway; provided, in no event shall any person park or leave standing any vehicle, whether attended or unattended, upon any highway unless a clear and unobstructed width of not less than fifteen (15) feet upon the main traveled portion of said highway opposite such standing vehicle shall be left free passage of other vehicles thereon, nor unless a clear view of such vehicle may be obtained from a distance of two hundred (200) feet in each direction upon such highway; provided, that if such vehicle is left parked, attended or unattended, one half hour after sunset or one half hour before sunrise, the person

Safety Regulations, Interstate Commerce Commission Safety Regulations, Part 2—Driving of Motor Vehicles:

2.22. Vehicles When Stopped Must Not Interfere With Other Traffic. No motor vehicles shall be stopped, parked, or left standing, whether attended or unattended, upon the traveled portion of any highway outside of a business or residence district, when it is practicable to stop, park, or leave the motor vehicle off the traveled portion of such highway. When conditions make it impracticable to move the motor vehicle from the traveled portion of the highway, every effort shall be made to leave all possible width of the highway opposite such standing motor vehicle for the free passage of other vehicles, and care taken to provide a clear view of such stopped motor vehicle as far as possible to the front and rear. (See also Rule 2.24.)

stopping it or parking it at that time or place, or causing it to be so stopped or parked or left standing, shall display appropriate signal lights thereon, sufficient to warn approaching traffic of its presence thereat. * * *"

APPENDIX "B".

Gaiennie v. *Cooperative Produce Co., Inc., et al.*, 199 So. page 377—No. 35877—Supreme Court of Louisiana—November 4, 1940. Rehearing Denied Dec. 2, 1940.

Questions Certified from Court of Appeal, First Circuit.

Suit by Charles S. Gaiennie against the Cooperative Produce Company, Inc., and another to recover damages for personal injuries. Judgment for plaintiff, and defendants appeal. On questions certified by the Court of Appeal. Questions Answered.

PONDER, Justice:

"This case is certified to us by the Court of Appeal for the First Circuit under the provisions of Article 7, Section 25, of the Constitution of this State, for instructions.

"In this suit the plaintiff is seeking damages for personal injuries, etc., arising out of an accident in which an automobile driven by the plaintiff, Charles F. Gaiennie, and a truck driven by Frank Monte, were involved. The suit is directed against the defendant and its public liability insurance carrier, the Massachusetts Bonding and Insurance Company. The case is pending on appeal in the Court of Appeal for the First Circuit from a judgment adverse to the defendant.

"The Court of Appeal states that it has no difficulty in reaching the conclusion that the driver of the truck of the defendant company was guilty of gross negligence, but entertains doubt, under the facts and circumstances whether

or not the plaintiff was guilty of such contributory negligence as to bar his recovery. The Court of Appeal desires answers to the following two questions: (1) What is the general rule that should be applied under the following and a similar state of facts; (2) Under the facts herein outlined, was the plaintiff guilty of such contributory negligence as to bar his recovery? The Court of Appeal in certifying the questions has given its examination of and conclusions upon the matters submitted. After examining the discussion of the case by the Court of Appeal, it is apparent that court is of the opinion that the judgment of the lower court should be affirmed.

"The statement of facts, as found by the Court of Appeal, is as follows: On the evening of Monday, October 4, 1937, between 8 and 8:30 o'clock, Frank Monte, employed by the Cooperative Produce Co., Inc., and driver of one of its trucks, was returning to Baton Rouge on Highway 71 after a day's work which took him to Opelousas and other points as far north as Marksville, Louisiana. The truck he was driving that day was not the one he drove regularly but one which his employer used locally in Baton Rouge. It was a Chevrolet truck, 1937 Model, having a stake body painted blue. He had a regular helper to go on his delivery trips with him, but on that day this helper did not show up so he took a negro boy with him as his helper. This boy has since died and his version of what happened on the night of the accident has never been given.

"Highway No. 71 in this section of West Baton Rouge Parish is straight for a distance of several miles. On reaching a point approximately ten miles west of Port Allen, the truck which Monte was driving ran out of gasoline and it was necessary for him to stop. The entire width of the highway at that point is approximately 52 feet, measured as follows: 20 feet of paved slab, 26 feet of shoulder on the north side, and 6 feet of shoulder on the south side. As Monte was traveling east, the south was to his right and the north to his left. He made no attempt to park the truck on the wider shoulder on the north because of traffic moving on the highway at that moment. He did park on the south side, but did not clear the paved portion of the highway,

one of the front wheels of the truck resting on the right shoulder and the other on the paved portion of the road, and both rear wheels resting on the pavement. The body of the truck extended at an angle across the paved slab of the right traffic lane for some five feet from the south edge thereof.

"There is some doubt arising out of the testimony that Monte left the headlights of the truck on after stopping, but assuming that they were burning, they naturally projected a beam of light directly in front of the truck in the manner in which it was parked and afforded no warning of its presence on the highway to traffic that was approaching it from the rear. The preponderance of the testimony shows that the tail and side clearance lights were not burning, and admittedly, there were no flares placed on the highway and no flares were even in the truck. Monte sent the helper to the nearest filling station for gasoline and he remained with the truck. Monte had a flash or searchlight with him but did not use it in trying to warn approaching traffic. Therefore, to traffic coming from the west, this truck, parked on a portion of the paved slab of the highway in the dark, was an object of peril placed and permitted to remain there through the negligence of Monte, who, it is admitted, was acting within the scope of his employment.

"Within a period of time which is not fixed, but which we estimate to be several minutes, during which Monte, the driver of this truck, occupied himself in a rather indefinite manner, as far as his testimony shows, in looking for flares in the truck, Charles S. Gaiennie, the plaintiff herein, approached the truck from the west in a Chevrolet coach belonging to his employer and which he was driving at a rate of speed estimated to be from 35 to 40 miles per hour. He kept his car in the south lane of travel on the paved portion of the highway which was to his right, and as he neared the point where the truck was parked he began meeting cars going west or in the opposite direction to that in which he was travelling. There were four or five cars following each other and all of them with the headlights burning so brightly as to dazzle his eyesight inter-

mittently. He dimmed the headlights on his car and slowed down its speed to between 20 and 25 miles per hour.

"The effect of the dazzling lights from the cars he was meeting was that he was not blinded by them but his vision was momentarily and intermittently impaired to the extent that instead of having a full view of the paved highway ahead of him as he had had without such impairment, his view of the pavement was limited to approximately 18 or 20 ft. within which distance he could, at the speed he was going, bring his car to a stop. As he had dimmed the headlights on his car, that had the effect of tilting the beam of light downward at an acute angle on the pavement in front of him, this also causing some restriction in his sight of the pavement as far as distance was concerned.

"Plaintiff felt safe in proceeding on the highway under the circumstances, and he did. As he passed the last of the series of cars whose dazzling headlights caused momentary impairment to his ordinary vision, his car, in the meantime covering such distance as its speed carried it, he found himself confronted with the truck parked on the highway without any sign or warning of its presence, some eight or ten feet ahead of him. The rear body of the truck was some 3 or 4 feet above the ground and extended back some four feet over the rear wheels, so that when plaintiff dimmed his lights the tilted beam of his headlights projected under the truck making it that much more difficult for him to see it.

"As the truck loomed in front of him he made an effort to avoid running into it by applying his brakes and pulling his car to the left in order to pass around it. He was too close then, however, to avert a collision. The right front end of his car struck the rear left end of the truck and because the body of the truck stood lower from the level of the pavement than the radiator and hood of the car by some two to four inches, the front end of the car was pushed under the truck and the upper parts of the car which are made of lighter material such as the radiator, the hood and cowl were badly crushed. The bumper which is made of stronger steel was bent in a sort of "U" shape and the frame to which the motor and body are attached was

slightly bent out of line on one end. There is some doubt whether the motor was pushed back but it is shown that the cowl and instrument board in front of the driver's seat were smashed and driven in. The damage to the truck apparently was negligible. It is doubtful whether the impact caused it to be moved forward any distance at all.

"The accident involved herein occurred during the year 1937, prior to the enactment of Act No. 286 of 1938. The law applicable to determine whether or not the plaintiff was guilty of negligence would be Act No. 21 of 1932, Section 3, Rule 4, paragraph (a), which makes it unlawful for any person to drive a motor vehicle upon the roads and highways of this State at any other than a careful, prudent, reasonable and proper speed, having due regard to the traffic, surface and width of the highway, the location and neighborhood, and any other conditions or circumstances then existing. The burden of proof is on the defendant to show that the plaintiff was negligent and that his negligence contributed to his injury. Inland & Seaboard Coasting Co. *v.* Tolson, 139 U. S. 551, 11 S. Ct. 653, 35 L. Ed. 270; Washington & Georgetown R. Co. *v.* Harmon's Adm'r, 147 U. S. 571, 13 S. Ct. 557, 37 L. Ed. 284. This doctrine was approved in Loprestie *v.* Roy Motors, Inc. et al., 191 La. 239, 185 So. 11.

"In the case of Woodley & Collins *v.* Schusters' Wholesale Produce Co., Inc., 170 La. 527, 128 So. 469, in discussing whether or not the driver of an automobile should be deemed negilgent for failing to slow down, we stated that it depended on the circumstances of the particular case, and that it is not easy, nor safe, to lay down a hard and fast rule on the subject. The difficulty in laying down a hard and fast rule is that the act provides that the conditions and circumstances must be considered as well as the traffic, surface and width of the highway, and the location of the neighborhood. Such being the case, the particular facts of each case must be considered in arriving at a conclusion, and it would not be safe to lay down a hard and fast rule for that reason.

"In the case of Louisiana Power & Light Co. *v.* Saia et al., La. App., 173 So. 537, the court stated in effect that a great many cases have held that the failure of the driver of a

moving vehicle to observe an obstruction—usually in the form of a stationary vehicle—constituted such negligence as would prevent recovery, and cited many cases to that effect; but, the court aptly said in effect that this result had not been reached regardless of surrounding circumstances and facts. In fact, the courts have been careful to say in each case that no circumstances were involved that would justify the failure of the driver to see the object ahead. It would appear that this is a reasonable interpretation of the provision of Act No. 21 of 1932, aforementioned, because it specifically provides that the conditions and circumstances must be considered. While the general rule makes it the duty of the driver of an automobile to maintain a speed sufficiently slow and to have such control of his car that he can stop within the distance in which he can plainly see an obstruction or danger ahead, yet it has been well recognized that this rule has exceptions and modifications. Jacobs *v.* Jocobs, 141 La. 272, 74 So. 992, L. R. A. 1917F, 253.

"In Kirk *v.* United Gas Public Service Co., 185 La. 580, 170 So. 1, this court stated that the general rule is not inflexible, and that its application depends on the facts and circumstances of each case. Many cases were cited therein where the rule was relaxed and the driver of the automobile exonerated from negligence.

"Many cases have held to the effect that ordinarily a motorist is negligent in not slowing down to a speed at which he can stop instantly when blinded by headlights. However, a careful examination will reveal that the circumstances and facts of each case were taken into consideration in arriving at a conclusion. Also, it has been held in many cases that a motorist was guilty of negligence because he failed to see the obstruction or object in time to stop before colliding with it; but, the facts and circumstances of each case have been considered in determining whether or not the motorist had sufficient reasons for not seeing the object or obstruction in time to stop.

"In the case of Moncrief *v.* Ober, 3 La. App. 660, it was held that a small cable stretched above the surface of a public road was such an unusual obstruction that the failure of a motorist to detect it did not indicate negligence on his part.

"In the case of Kirk *v.* United Gas Public Service Co., supra, wherein a motorist saw an object ahead of him in the road which he thought was a shadow or repaired patch in the road and did not observe that it was a dead yearling until a moment before it was struck, when it was too late to stop, we arrived at the conclusion that it would be unreasonable to hold the motorist negligent in failing to see the yearling sooner than he did.

"From the facts certified it appears that the plaintiff was driving at a moderate rate of speed, between 40 or 45 miles an hour, on an open highway, with his car properly lighted, and that he slowed down to between 20 and 25 miles an hour on meeting the approaching cars. There is nothing to indicate that the neighborhood within the vicinity was thickly populated. There is nothing in the facts to indicate that the location was such that the plaintiff would expect cars to be parked on the highway, as would be expected where the location was thickly populated. It appears that the plaintiff was traveling at such a speed, after he slowed down, to enable him to meet an ordinary emergency under the circumstances. If the truck had been parked entirely on the pavement the plaintiff could more easily have seen the wheels and running gear, but the truck was parked at an angle on the edge of the highway with the body extending out into the road some three or four feet above the ground, and some four feet beyond the rear wheels. It was the duty of the plaintiff when meeting the approaching cars to dim his lights. When he dimmed the lights the beam was necessarily thrown down on the highway, causing it to shine under the rear end of the truck, which was protruding some distance over the road. Under these circumstances, we do not think the plaintiff was negligent in failing to see the truck sooner than he did.

"For the reasons set out above, our answer to the first question is that we cannot lay down a hard and fast rule to govern in these types of cases because so much depends upon the circumstances of each particular case.

"Our answer to question two is that under the facts outlined the plaintiff was not guilty of contributory negligence."

APPENDIX "C".

Rules of Civil Procedure for the District Courts of the United States.

Rule 8. General Rules of Pleading.

(a) *Claims for Relief.* A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

* * * * * * *

(f) *Construction of Pleadings.* All pleadings shall be so construed as to do substantial justice.

The 5th Circuit, in Hollander *v.* Davis, 120 Fed. (2d) 131, 133, construes this rule as follows:

"The sharp and technical condemnation of pleading that once obtained does not now exist. If the complaint states fully and simply a cause of action it is sufficient; and if such narrated facts measure to gross negligence or wilful and wanton misconduct it meets the requirements of the Florida automobile guest statute. Rule 8, Rules of Civil Procedure for District Courts, 28 U. S. C. A. following Sec. 723; Holtzoff, New Federal Procedure and the Courts, Page 24."

APPENDIX "D".

SHELL OIL CO., INC., v. SLADE ET AL.

No. 10353

CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT, FEB. 2, 1943

Rehearing Denied March 12, 1943

1. Automobiles [key symbol] 306(2)

In action for death of truck driver in collision in fog with overturned truck, evidence supported verdict finding that fog was caused or contributed by defendant's discharge of hot water into highway canal.

2. Automobiles [key symbol] 284, 286

Under Louisiana law, motorist entering a fog so dense as to obstruct vision must stop until he is sure of his way, or, if he drives into it, he must proceed at such a speed as will permit him to stop in distance within which he can see objects in his way.

3. Automobiles [key symbol] 306(8)

In action for death of truck driver in collision with an overturned truck in a fog which was allegedly created by negligent discharge by defendant of hot water into highway canal, evidence that decedent was warned of fog by preceding truck, and that decedent drove into fog at a speed which would not permit him to stop in distance within which he could see an object in front of him, under Louisiana law established decedent's contributory negligence as a matter of law.

4. Automobiles [key symbol] 284

Where undisputed evidence disclosed that deceased truck driver had timely warning of fog which concealed overturned truck before he drove into such fog and collided with overturned truck, there could be no recovery for death of truck driver either on theory of negligence of oil company

in creating fog by discharge of hot water into highway canal or on theory of "sudden emergency".

See Words and Phrases, Permanent Edition, for all other definitions of "Sudden Emergency".

5. Negligence [key symbol] 72

Defense of "sudden emergency" is never available where that emergency is result of claimant's previous contributory negligence.

HOLMES, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Southern District of Mississippi; Sidney C. Mize, Judge.

Action by Mrs. Leslie F. Slade and others against the Shell Oil Company, Incorporated, to recover for death of named plaintiff's husband when his truck collided with an overturned truck in a dense fog which was allegedly created by defendant's discharge of hot water into a highway canal. From a judgment for plaintiff, defendant appeals.

Reversed and remanded.

Thomas H. Watkins, of Jackson, Miss., William Saunders Henley, of Hazlehurst, Miss., and Harry McCall, of New Orleans, La., for appellant.

Ross R. Barnett and P. Z. Jones, both of Jackson, Miss., and Frank F. Mize, of Forest, Miss., for appellee.

Before Sibley, Hutcheson, and Holmes, Circuit Judges.

HUTCHESON, Circuit Judge.

The complaint for death damages resulting from an automobile collision in a fog was in two counts. The first count charged negligence, the second maintenance of a nuisance. The gravamen of both counts was that: *for a long period of time prior to the injury, defendant had permitted the discharge from its plant into an open drainage ditch and thence into a canal along the side of the highway* of large quantities of very hot water with the result that in the cool of the evenings and early mornings they created dense and heavy fogs immediately above the paved highway; and that plaintiffs' intestate, driving along it at about 7:15 on the morning of March 4, 1940, with his vision wholly obscured on said occasion by said dense and heavy fog and cloud *so that*

he could not, and did not, see it, had run into and against a truck which had been overturned on the shoulder of the highway.

The defendant, admitting that at the time plaintiffs' decedent came to his death there was a dense fog over the highway which wholly obscured the vision of all persons driving vehicles thereon, alleged that the death was caused by the decedent's own contributory negligence in driving into the fog at a rate of speed such that he could not stop within the range of his vision.

[1] Tried to a jury, while the evidence was conflicting as to whether the heavy fog which admittedly was present was caused or contributed to by defendant's discharge of hot water into the highway canal, *there was sufficient evidence to support the verdict of the jury that it was.* The evidence, however, as to the blinding nature and extent of the fog and as to how the accident came about was without substantial conflict. All of the witnesses put on by plaintiff agreed that a thin fog began at least one-half mile from the place of the accident *and that when the drivers entered the thin fog they could see a heavy fog ahead;* that the line between the thin fog and the thick fog was like looking out of a lighted room into a dark one;[1] that the thick fog was

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[1] As Rogers described it: "It looked like a cloud sitting down there and when you ran into it you had to be pretty cautious. There was a spot in there about 100 feet or so that was extremely thick. I knew I was taking a chance that morning when I ran into that fog." Greer testified: "I was about one-half mile from the thick fog when I looked in my rear view mirror and saw Slade coming about 250 yards behind me. I was going about 35 miles per hour. As I began to slow down, I blinked my lights and then I ran into a thick fog that cut off vision altogether. When I hit the thin fog, I was going about 20 or 25 miles per hour and I was slowing down all the time. My vision became obstructed when I hit the thick fog. When I was in the thin fog, the thick fog did not look like fog to me. It looked like smoke over the road and you couldn't tell what distance it was. Driving into the fog you would get into it before

like a wall in front of them. All agreed that in driving through the fog without coming to a stop or slowing down so they could stop immediately, they were taking a chance. *All agreed that in the thick fog the person turning off the highway onto the shoulder could not see obstructions there.* All agreed that Slade did not see the truck and ran into it at a speed estimated by Greer at 20 and by Arnold at 10 miles per hour. The undisputed evidence as to the force of the collision, and the photographs showing the condition of the trucks after the collision, established that heavily loaded as it was, a combination tractor and semi-trailer,

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you could see it. I knew where I was and I had seen fog awful thick rising from that ditch." He further testified that as he got into the thick fog, he suddenly came on a parked truck, that he went around the truck on the shoulder of the road and ran into another truck and turned over to avoid hitting it; that Slade came on following the route he had taken and ran into the back end of his truck, running about 46 feet after he made his right turn off the paved road, and that when he hit the truck, Slade was making about 20 miles per hour; that Slade had driven about 90 feet from where Greer went into the thick fog; there was nothing between him and Slade to keep Slade from seeing his truck as it disappeared into the fog. "When I got into the thick fog, he was about 250 yards behind, and he could have stopped three or four times in that space. He could have slowed down to 5 miles an hour after seeing me disappear into the fog and if he had been going at that rate he could have stopped in five feet." That he (Greer) could not see in the fog over 10 or 15 feet, and that if Slade had brought his truck down to 5 miles an hour, there would have been no reason for his running into Greer. He testified that he did not change gears. He did not know whether Slade did or not. That he knew he was taking a chance in driving into that fog at 20 or 25 miles an hour. That Slade was one of the best drivers they had and one of the fastest. Finn testified that when he first got into the fog he could see, but after a certain distance the visibility was nil; that before he got into the fog, he could see the bank of fog across the highway as he approached it. The fog was so

the tractor weighing 5400 pounds, the trailer weighing *7200* pounds and carrying a *9000 pound load,* and therefore, much more difficult to stop than an empty truck, Slade's truck was running much too fast for safety. Notwithstanding these undisputed facts, the district judge, instructing a verdict for defendant on the nuisance count, denied its motion to instruct for it on the negligence count. There was a verdict on this count for plaintiff for $35,000, a credit on it of $3,300 received as workmen's compensation, and a re-

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thick that there was no visibility as far as driving was concerned. "You couldn't see into the fog, you would have to stick your head out of the window and look where the black line was so you could go on through." Arnold, the truck driver who was run into by Greer, testified that after he and Greer had had their collision he saw Slade coming. "I was in the cab of my truck. My truck was still. When I saw Slade coming the Greer truck had not turned over altogether. Slade came along and hit us, and we all went down." As to Slade's speed, he said, "It is hard to tell how fast he was driving, but I know he couldn't have been driving on the shoulder more than 10 miles per hour." He also said that Greer and Slade were driving at the same rate of speed, and that he couldn't see whether he was going 10, 15 or 20 on the highway, that off the highway he couldn't have been going more than 10 miles an hour. As to the collision, he said, "A man came over and clipped me and had me up on two wheels. I watched and seen the other one coming. I thought, 'My God, he won't stop, he will never see us.' He ran on up just like you would run into a dark room and run into a table." As to the fog, he testified: "The fog was a heavy one and you couldn't see anything. When I first got into it it was a little thick, and I said to myself, 'Get off the highway and play safe', and I did. When you hit the thin fog you could see the wall of the thick fog in front of you. There is always a good little mist before the heavy one. The little mist ain't very far away from the big one. I knew where I was, and I always used caution. The fog at Norco when you get into it lies there like a thin coat of ice and the only way you can run through it is to stick your head out of the window."

quirement by the judge that plaintiff remit another $3,000.

Defendant has appealed, assigning numerous errors; that a verdict should have been instructed for it because (1) the evidence failed to show defendant was guilty of negligence proximately causing the injury and (2) that it showed contributory negligence as a matter of law; that the verdict was so large in amount as to evidence passion and prejudice; and that the court had erred in the admission and rejection of evidence and in giving and refusing instructions.

Here, not waiving any of its points appellant vigorously urges upon us (1) that the fog was not due to any negligence of defendant, but if it was, the fog was merely a condition and not a proximate cause of the collision, and (2) the deceased was himself guilty of contributory negligence. [2-5] Since we are quite certain that but for Slade's contributory negligence, the injury would not have occurred and that defendant should, therefore, have had an instructed verdict on this ground, we find it unnecessary to consider the other points appellant urges upon us. It is settled law in Louisiana that one *entering a fog,* such as the one pleaded and testified to here, must stop until sure of his way, or if he drives into it, he must proceed at such a speed as that he can stop the car *in the distance within which he can see objects in his way.* It will not do for such a one to say, as here, that he was driving 20, 15 or even 10 miles an hour. The evidence establishes that in the fog *he did not see and could not see the object he ran into within* the distance within which he could stop his truck, but more than that, it shows that, fully warned by the fog in the road, by Greer's blinking his lights at him and by Greer's disappearance in the fog, he took the hazardous course not of turning off onto the shoulder *to stop, but of trying to drive around the cars in the road by using the shoulder when in the fog there was no way by which he could determine whether other cars were parked there or whether there were other obstructions in his way.* That Slade drove into a dense fog where he could not see his way and was the author of his own death, both the pleadings and the evidence leave in no doubt. Plaintiffs pleaded that "the vision of said Slade

was wholly obscured on said occasion by said dense and heavy fog and cloud, and in such fog or cloud he was unable to turn the truck toward his right or left and avoid running into the overturned truck, and was unable to stop the truck in sufficient time to avoid a collision and head on crash with the overturned truck." The evidence establishes that this was so. Under these undisputed facts it will not do for plaintiffs to plead and claim that in driving as he did, Slade was in the exercise of due care. For it is settled by a long line of Louisiana cases[2] that he was guilty of contributory negligence as a matter of law and may not recover for injuries resulting therefrom. Appellees' insistence, with ci-

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[2] O'Rourke *v.* McConaughey, La. App., 157 So. 598; Dominick *v.* Haynes Bros., 13 La. App. 434, 127 So. 31; In Castille *v.* Richards, 157 La. 274, 102 So. 398, the court held that where two automobiles were coming into a cloud of dust it was inexcusable negligence for the drivers of the automobiles not to have come to a full stop until the dust had subsided. In Raziano *v.* Trauth, 15 La. App. 650, 131 So. 212, 213, the Court said: "The fact that he did not see the truck until so close upon it cannot excuse him, for he must be held to have seen what he should have seen * * * and, if the fog affected his vision, he should not have maintained a speed of 20 miles an hour." Rector *v.* Allied Van Lines, La. App., 198 So. 516, holds flatly that the presence of smoke or dust on the road is not the proximate cause of an injury if such fog covered the highway, but the failure to exercise care in driving into the fog is. Other cases in point are Maggio *v.* M. F. Bradford Motor Exp., La. App., 171 So. 859; Inman *v.* Silver Fleet, La. App., 175 So. 436; Hutchinson *v.* T. L. James & Co., La. App., 160 So. 447; Penton *v.* Sears, Roebuck & Co., La. App., 4 So. 2d 547; and Russo *v.* Aucoin, La. App., 7 So. 2d 744. This court has uniformly taken the same view, Smith *v.* Southern Railway Co., 5 Cir., 53 F. 2d 186; Brown *v.* Southern Railway, 5 Cir., 61 F. 2d 399, Cf. Thompson *v.* City of Houma, 5 Cir., 76 F 2d 793; C. C. Moore *v.* Hayes, 5 Cir., 119 F. 2d 742.

tation of cases,[3] none, however, from Louisiana, to the effect that it is negligence to envelope a highway with fog or smoke caused by the starting of negligent fires or the sudden eruction of steam, cinders or dust, and that one injured by that negligence concurring with the negligence of another may recover, will not avail them here. For in none of those cases, as here, was there contributory negligence completely barring recovery. Nor may appellees rely, as they seek to do, upon the doctrine of sudden emergency both because the evidence establishes without dispute that the deceased had full warning of the dangers in ample time to provide against them and because the defense of sudden emergency is never available where that emergency is the result of the claimant's previous contributory negligence.[4] Slade had had long

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[3] Keith *v.* Yazoo & M. V. R. Co., 168 Miss. 519, 151 So. 916; Southern Cotton Oil Co. *v.* Wallace, 27 Ga. App. 415, 108 S. E. 624; McCombs *v.* Southern Railway Co., 39 Ga. App. 716, 148 S. E. 407; Farrer *v.* Southern Railway Co., 45 Ga. App. 84, 163 S. E. 237; Ryan *v.* First National Bank & Trust Co., 236 Wis. 226, 294 N. W. 832; Pisarki *v.* Wisconsin Tunnel & Const. Co., 174 Wis. 377, 183 N. W. 164; Pitcairn et al. *v.* Whiteside, Ind. App., 34 N. E. 2d 943.

[4] Walker *v.* Southern Advance Bag & Paper Co., La. App., 150 So. 865; Myers *v.* Sanders, 189 Miss. 198, 194 So. 300; Harper *v.* Holmes, La. App., 189 So. 463; Prevost *v.* Smith, La. App., 197 So. 905; all holding that the plea of sudden emergency may be availed of only when he who pleads it is himself free from fault and has not contributed to the creation of the emergency. In Pendola *v.* State, La. App., 4 So. 2d 28, the court, denying the application of the rule, said that if any emergency arose it was one created by the driver's failure to properly act in time to control his car, while in Meaux *v.* Gulf Ins. Co., La. App., 182 So. 158, 161, the court said: "Under the well recognized rule that the driver of an automobile should always have his car under such control, when driving with his headlights on, so as to stop it within the distance which his lights project in front of him, the defendant Patin is bound to be held negligent in this case."

experience as a truck driver, more than half of it in driving over this identical route. He knew the I. C. C. Safety Rules for Motor Carriers, and particularly rule 231, providing: "Extreme caution in the operation of motor vehicles shall be exercised under hazardous conditions such as snow, ice, sleet, fog, mist, rain, dust, smoke or any other condition which adversely affects visibility or traction, and speed shall be reduced accordingly." Slade was not only warned by his own vision of the fog, but by Greer who turned his lights on and blinked them to indicate to Slade that there was danger ahead, and he also saw Greer enter and disappear in the fog. What is said in Lapeze *v.* O'Keefe, La. App., 158 So. 36, 37, is particularly apposite here: "The evidence shows that, just prior to entering the fog bank in which the accident occurred, he had passed through several small drifts, emerging therefrom almost as soon as he entered, and that he thought they were all of the same character. He had no reason to anticipate this. Instead of being lulled by these signals, they ought to have served as ample warning of greater danger ahead." Cf. Inman *v.* Silver Fleet and Rector *v.* Allied Van Lines, note 2, supra. In Campbell *v.* Texas & P. R. Co., La. App. 182 So. 339, the court said it did not find it necessary to determine whether the railway company was negligent in causing a dense smoke to envelope the highway for the contributory negligence of the plaintiff in driving into the smoke was the cause of the accident. Other cases in point are Illinois Central Railroad Co. *v.* Oswald, 338 Ill. 270, 170 N. E. 247; Anderson *v.* Byrd, 133 Neb. 483, 275 N. W. 825; Mitsuda *v.* Isbell, et al., 71 Cal. App. 221, 234 P. 928, and Domite *v.* Thompson, La. App., 9 So. 2d 55, where the physical facts, as here, compelled the conclusion that the truck was being driven beyond safe speed.

The judgment is reversed and the cause is remanded for further and not inconsistent proceedings.

HOLMES, Circuit Judge (dissenting).

I cannot concur in the majority opinion in this case without consciously invading the province of the jury. This is true because I think there was substantial evidence to support the verdict and all the findings of fact implicit therein.

The issue as to contributory negligence depends upon direct and circumstantial evidence. The direct evidence consists of the testimony of two eye witnesses, one of whom said that Slade was driving not more than ten miles per hour, the other twenty miles, when he met his death.

Under the evidence, different inferences might be drawn by fair and reasonable men as to the density of this fog and as to whether it was negligent to move within it at a speed not exceeding ten miles per hour. The district court did not err in refusing to decide, as a matter of law, that Slade was negligent in proceeding into a thin fog that suddenly became dense after he had traveled a short distance.

APPENDIX "E".

Cases Cited by the Majority Opinion Distinguished.

The Court of Appeals declared:

"Under these undisputed facts it will not do for plaintiffs to plead and claim that in driving as he did, Slade was in the exercise of due care. For it is settled by a long line of Louisiana cases that he was guilty of contributory negligence as a matter of law and may not recover for injuries resulting therefrom."

But the Court of Appeals inadvertently did not advert to controlling statutes and decisions hereinabove collated and which constitute the Louisiana law. The cases cited by the Court of Appeals are either readily distinguishable or not in accordance with controlling decisions of the Supreme Court in that state.

The Court of Appeals cited the following cases from the Courts of Appeal in Louisiana, which are all inferior courts:

(a) O'Rourke *v.* McConaughey, (Ct. App., Orleans), 157 So. 598. This was a fog case and the Court declared: p. 605.

"* * * The general rule emerges, by the weight of authority, that the operator of a motor vehicle * * *

shall have his car under such control that he can bring it to a complete stop within the range of his vision or the penetration of his headlights,"

which conflicts directly with Gaiennie *v.* Cooperative Produce Co., 196 La. 417, 199 So. 377, 610 (Appendix B, supra).

Again, that Court erroneously declared: p. 605.

"Futch *v.* Addison et al. (12 La. App. 535, 126 So. 590), Stafford *v.* Nelson Bros. (15 La. App. 51, 130 So. 234, 235), and Hanno *v.* Motor Freight Lines * * * (17 La. App. 62, 134 So. 317, 318), we believe not to be in accord with the jurisprudence; the circumstances in those cases being such that we believe the driver of the automobile should have anticipated and been in a position to avoid the collision. The dissenting opinion of Judge Elliott in the Hanno Case correctly states the rule thus: 'The rule is that a motorist on a highway at night must keep his car under such control that he can stop and avoid an obstruction within the distance that his headlights illuminate the way.' "

Again, in the O'Rourke Case, the fog was natural, not the outcome of defendant's wrong, wherein "there was no visibility as far as driving was concerned." Surely by this barrier Slade could not be compelled to stop on the Airline Highway and be subject to being run into from behind, unless he went forward at his own peril.

Again, that which caused Slade's death was not the speed, but the collapse of his cab.

That opinion concedes, "Fog constitutes the greatest menace of transportation whether upon land or sea and is the most feared of all perils that confront the traveler," and, quite inconsistently, cites Peart *v.* Orleans-Kenner Traction Co. (Ct. App., Orleans), 123 So. 822, wherein a recovery was had for a crossing collision in a fog. Note the extent whereto that opinion goes:

"It is no defense that traffic might be delayed indefinitely and business interfered with, as considerations of convenience must ever give way to the safety of life and limb,"

which might afford some show of reasons where the fog was created by nature, but certainly one where it arose by act of the defendant, and there is an absolute liability for

such a nuisance. 39 *Am. Juris.*, 475; Hoffman *v.* Bristol, 113 Conn. 386, 155 A. 499, 75 A. L. R. 1191; McFarlane *v.* Niagara Falls, 247 N. Y. 348, 160 N. E. 393, 57 A. L. R. 6, where, in such cases, the plaintiff is not defeated except where his act "is so extreme as to be equivalent to invitation of injury * * *."

(b) Dominick *v.* Haynes Bros. (Ct. App., 2nd Cir.), 127 So. 31, 32.

There, without cause, two drivers dashed into an impenetrable cloud of dust raised by a third automobile without cause. Each was held guilty of negligence in so doing. It was said:

"It is the duty of the driver of an automobile to stop his car when his vision is entirely obscured by a temporary obstruction, such as a cloud of dust or smoke screen. When failure to do so would jeopardize the safety of others, then he must remain at a standstill until the obstruction has come to an end,"

but here, the Oil Company had erected a fog, the duration of which was indefinite, and was an absolute nuisance without right of creation on its part, wherefor, under almost the unanimous rule, responsibility follows, except in the cases above indicated.

(c) Castille *v.* Richard, 157 La. 274, 102 So. 398, 37 A. L. R. 586, is a Supreme Court decision and in direct accord with the *Gaiennie Case* and other decisions upon which we rely.

(d) Raziano *v.* Trauth (Ct. App., Orleans), 131 So. 212. There, the holding was:

"The evidence on the question of the prevalence of fog in the vicinity of the accident is not entirely satisfactory. We will assume, however, since the evidence seems to preponderate to that effect, that there was a light fog. In so far as the light is concerned, it is difficult to understand how a light of that small candle power could have seriously affected his view. But, assuming that the light and fog did affect his view, he would be required to exercise a degree of

caution commensurate with the increased danger these circumstances involved. The fact that he did not see the truck until so close upon it cannot excuse him, for he must be held to have seen what he should have seen, or what a man of ordinary eyesight could have seen, and, if the fog affected his vision, he should not have maintained a speed of 20 miles an hour knowing that he was driving on a very narrow thoroughfare."

This, with deference, does not seriously conflict with that wherefor we contend.

(e) Rector *v.* Allied Van Lines (Ct. App., 2nd Cir.), 198 So. 516.

This decision was:

"Under the existing jurisprudence, it must be held in the instant case that the negligence of McCampbell in failing to exercise due diligence in his driving and to avert the collision, as could have been done, was the proximate and immediate cause of the accident, while the negligence of the Chevrolet's occupants was the remote cause; that the last clear chance was with him; and that plaintiffs are entitled to obtain repairment of the damages occasioned them, notwithstanding their negligence continued to the moment of the Accident."

This, with deference, does not necessarily conflict with the rule as laid down in the Supreme Court.

(f) Maggio *v.* Bradford Motor Express (Ct. App., Orleans), 171 So. 859.

Therein defendant ran into the rear of plaintiff's car, both proceeding in the same direction, defendant claiming to have been blinded by oncoming lights. Plaintiff's taillight was probably not burning.

(g) Inman *v.* Silver Fleet (Ct. App., 1st Cir.), 175 So. 436, 438, wherein it was said:

"Suffice it to say that we know of no law that would relieve the driver of an automobile at night on the highways from keeping a proper lookout and in keeping the automobile under such control as to be able to stop on approaching

an obstruction in the road plainly visible and where such obstruction is likely to appear as is the case on the travelled part of a paved public highway. Such a rule would tend to increase accidents rather than prevent them." (Where plaintiff could have seen 500 feet and did not).

This case likewise was a natural fog case and not the case where an absolute nuisance was maintained.

(h) Hutchinson *v.* James (Ct. App., Orleans), 160 So. 447, involved a rear-end collision between a truck, wherein the driver claimed he was going only about eight miles an hour. The case was tried on the theory of the truck, which stopped, being an obstruction, and said the Court:

"We reiterate what we said there and also what was said in Lapeze *v.* O'Keefe et al. (La. App.) 158 So. 36, to the effect that when a dense fog prevails, or any other condition which so affects the vision of a motorist as to make it unsafe to proceed, his duty is to stop and to remain stopped until such time as he can see where he is going,"

but, as above pointed out with reference to Lapeze *v.* O'Keefe, there is a fundamental difference between a natural fog and an artificial fog. In one there may be negligence, in the other there is absolute nuisance, if not wilfullness. The decision is not seriously out of line with the decisions of the Supreme Court.

(i) Penton *v.* Sears (Ct. App., 1st Cir.), 4 So. 2d 547, said:

"The fact that his car skidded for some distance and then struck this large and heavy truck with sufficient force to push it several feet forward indicates that he was going at a very fast rate of speed even when his car hit the truck," and in no way conflicts with that wherefor contention is made here.

(j) Russo *v.* Aucoin (Ct. App., 1st Cir.), 7 So. 2d 744.

There, the driver rounded a curve in car with inadequate brakes and ran into a truck. The driver thus so doing was held solely responsible.

As to the Federal cases cited, the Court of Appeals was bound to conform to the statute of Louisiana, as construed by its Supreme Court.

(k) It is to be noted that Smith *v.* Southern Ry. Co., 5 Cir., 53 Fed. 2d 186, cited, was an accident near Central Junction in Chatham county, Georgia, whereasto, appropriately, Georgia cases were cited. Obviously, this could not in any way be here persuasive.

(l) Brown *v.* Southern Ry. Co., 5 Cir., 61 Fed. 2d 399, likewise was a Georgia accident near Savannah, whereasto, likewise, properly, Georgia cases were cited and cases from the Federal Court, this predating Erie R. Co. *v.* Tompkins, *supra*, and, apparently, Georgia having no statute for construction as is true in Louisiana.

(m) Thompson *v.* City of Houma, 5 Cir., 76 Fed. 2d 793, was a Louisiana case, predating by three years Erie R. Co. *v.* Tompkins, and disregarded completely the Louisiana statute apparently then applicable. Note where liability was imposed, German *v.* City of New Orleans (Ct. App., Orleans), 3 So. 2d 181, 182, under very similar circumstances. See, also, Jacobs *v.* Jacobs, 141 La. 272, 74 So. 992, L. R. A. 1917F, 253, whereto, apparently, the Court of Appeals for the Fifth Circuit paid no heed, as it was then, assuming there was no statute, its right on questions of general law, but this disregard of the local statute as judicially construed, with deference, was improper.

(n) C. C. Moore Const. Co. *v.* Hayes, 5 Cir., 119 Fed. 2d 742, is not a Louisiana case but one arising under the laws of Mississippi, and, of course, is inapposite. Compare Mississippi Export R. Co. *v.* Summers (Miss.), 11 So. 2d 429, but see Domite *v.* Thompson (Ct. App., La., 2d Cir.), 9 So. 2d 55, wherein such a fog as was here created by the defendant was held to require warning to approaching motorists of an obstruction of a crossing by a train. The physical facts in the Domite Case vary fundamentally from those here. There the collision was head-on, and the evidences were "the almost complete smashing up of the front part of the truck; also the sound of the impact heard by a number of witnesses as well as the very great injury suffered by Mr. Domite," but here, there was no evidence of any sound of any such impact, no evidence that the overturned truck which was struck was in any way moved, and,

frankly, no substantial injury to the front part of Slade's tractor, the damage wrought by the work done being confined to the area whereat Slade's cabin was, under the tremendous mass, moving and working, with deference, as though through a lever.

Suffice it, in the face of a direct Supreme Court decision, many times reaffirmed, holding a case like this to be for the jury, the Court of Appeals should not have passed over these decisions of the Supreme Court of Louisiana and reversed where, under substantially similar facts, we submit, with deference, that Court would have affirmed.